IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-262

FAYETTA GILBOUGH GANNON,
INDIVIDUALLY AND AS EXECUTRIX
AND TRUSTEE OF THE ESTATE OF
CLAIR H. GANNON, DECEASED,
Petitioner,

v.

MOBIL OIL COMPANY, A DIVISION
OF SOCONY OIL COMPANY, INC.,
A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

FRED G. GANNON
Pro Se
(beneficiary of the estate
represented by petitioner)
7034 Turtle Creek Blvd.
Dallas, Texas 75205

PEERLESS PRINTING & PUBLISHING CO., DENVER, COLORADO

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF CITATIONS

Cases.

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

FAYETTA GILBOUGH GANNON,
INDIVIDUALLY AND AS EXECUTRIX
AND TRUSTEE OF THE ESTATE OF
CLAIR H. GANNON, DECEASED,
Petitioner,

v.

MOBIL OIL COMPANY, A DIVISION
OF SOCONY OIL COMPANY, INC.,
A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, Fayetta Gilbough Gannon, individually, and as executrix and trustee of the Estate of Clair H. Gannon, deceased ("Gannon"), respectfully

prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 30, 1978 and the order denying petitioner's Motion for Rehearing entered on May 3, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A, *infra*, pp. 1a-15a. The Order of the Court of Appeals denying rehearing dated May 3, 1978 appears in Appendix B, *infra*, pp. 16a-17a. The Order of the Court of Appeals denying clarification dated May 5, 1978 appears as Appendix C, *infra*, p. 18a. The opinion of the District Court for the Eastern District of Oklahoma, dated September 15, 1976 appears in Appendix D, *infra*, pp. 19a-36a.

JURISDICTION

The order of the Court of Appeals for the Tenth Circuit denying rehearing was entered on May 3, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals may authorize the destruction of oil wells without regard to secondary or other methods of recovering the oil by the injection of artificial energy into the reservoir in violation of Oklahoma law governing damages for torts and without regard to the public interest at this time of America's grave energy crisis.

2. Whether the judgment of the Court of Appeals whose foundation rests upon a completely and totally false statement of fact upon the most fundamental issue in the lawsuit should be permitted to stand.

3. Whether the judgments of the Court of Appeals and the District Court were such extreme disregard of the facts and in such flagrant violation of the Federal Rules of Civil Procedure and Oklahoma substantive and statutory law that there has been a gross miscarriage of justice.

STATUTORY PROVISIONS AND RULES INVOLVED

12 Okla. Stat. Anno. 1971 §95

23 Okla. Stat. Anno. 1971 §5 and 61

Rules 1-101 and 3-401 of the Oklahoma Corporation Commission

(The above statutes and rules, or applicable portions thereof, appear in Appendix E, *infra*, pp. 37a-39a.

Rules 16 and 50 F.R. Civ. P., 28 U.S.C.

STATEMENT OF THE CASE

This diversity tort action for damages for the destruction of six oil wells was based upon intentional interference with contract and trespass.

On October 14, 1959 petitioner (Gannon) executed an oil and gas lease to respondent (Mobil) for a primary term of ten (10) years upon 570 acres of land in Murray County, Oklahoma (R.491) upon which at the time of execution of the said lease there were located six (6) suspended oil wells completed in the Second Bromide sand (R.10, 215, 234).

Mobil re-entered five (5) of these wells and drilled and completed one more well in the said Bromide sand. Mobil conducted a secondary recovery *in situ* fireflood operation to produce the 5,000,000 barrels of low gravity oil in the reservoir in which these wells were completed but terminated such operations in October, 1966 (R.502) after explosions in two of the air injection wells.

Mobil's technical study of November, 1966 (R.502) confirmed that secondary recovery methods could produce this oil "in significant quantities" but at the time the oil was only $2.30 per barrel which was about equal to the operating costs and Mobil decided at that time to terminate its operation.

On August 3, 1967 Mobil farmed out these wells to Nelson I. Geyer (R.505) for *primary operations only* and pursuant thereto executed an assignment to him of the oil and gas lease, insofar as it covered the oil sand in which the wells were completed, for a term of three (3) years terminating on December 29, 1970.

The last production of oil from the wells by Mobil was in October, 1966 (R.502) and the last operator to produce oil from same was Geyer and this was during or prior to April, 1968 (R.28).

The October 14, 1959 lease to Mobil actually terminated on October 14, 1968. The Court of Appeals wrote that the lease terminated, at the latest possible date, on December 24, 1970.

Thermo-Dyne, Inc. (Geyer), a fully registered, qualified and financially responsible Oklahoma oil operator, wanted to use the wells to produce the oil in the reservoir (R.112) and, by letters of August 23, 1971 (R.512) and October 4, 1971 (R.514), twice offered in writing to relieve Mobil of any duty that it might have pertaining to the plugging of the wells and also informed Mobil of its intention to acquire a new oil and gas lease on this property. This intention was confirmed by letter to Gannon of October 20, 1971 (R.516).

On November 1, 1971 Gannon, who had not been informed by Mobil as to what it had done or not done on the property (R.55), wrote to Mobil and inquired as to what was its position in regard to this property (R.517) and Mobil replied by letter received by Gannon on

November 17, 1971 stating that it was in the process of plugging these wells (R.518). Upon learning this Gannon immediately, by telephone, informed Mobil of its negotiations with Thermo-Dyne and that the wells and the equipment in same were owned by Gannon and made demand upon Mobil not to plug the wells. Mobil at that time assured Gannon that it would not plug (R.36-38).

Despite Gannon's demand, its assurances to Gannon that it would not plug, the offers in writing from Thermo-Dyne to relieve it of any duty pertaining to plugging and its knowledge that the wells were to be used to produce the oil, Mobil proceeded to plug and destroy all the wells by squeezing hundreds of sacks of cement into the face of the oil producing formation, cementing steel tubing and iron into each of the wells and filling each well from top to bottom with cement (R.520).

Mobil's own official plugging reports filed with the Oklahoma authorities show that Mobil had not completed the plugging of any of the wells at the time of the said demand not to plug by Gannon (R.520) and in fact the final plugging was three weeks subsequent thereto.

There was no evidence of any compulsion from the Oklahoma Corporation Commission or other authority upon Mobil to plug these wells.

Mobil completed the plugging on December 8, 1971 (R.520) and on January 7, 1972 Gannon granted a new oil and gas lease to Thermo-Dyne for a term of three years which lease expired on January 7, 1975 (R.51, 122).

Under this lease Thermo-Dyne in February, 1972 attempted to re-enter one of the wells plugged by Mobil and was unable to do so because it could not drill out the steel and iron that had been cemented into the hole by

Mobil and it abandoned that attempt (R.129, 135, 198). It next drilled a new well in August, 1974 and completed same in the Second Bromide oil sand (R.191, 201).

Thermo-Dyne next re-entered one of the wells (R.201) which had been plugged by Mobil but gave up that effort. Geyer, the president of Thermo-Dyne, testified that to re-enter the other wells, if one were successful, would cost $40,000.00 to $50,000.00 for each well and that a reasonable and prudent operator would prefer to spend $100,000.00 per well to drill new wells rather than attempt to re-enter the plugged wells (R.137, 141-144).

Both lower Courts considered only the meagre evidence on the uneconomic primary production operation by Geyer that was terminated in April, 1968, they utterly ignored the testimony of Gannon's experts, whose qualifications were accepted by Mobil, that the wells could have been profitably produced by secondary recovery methods at the time of plugging in December, 1971 and they confused the work by Thermo-Dyne under the new 1972 lease, which was solely a drilling operation to replace the plugged wells, with a producing operation.

The oil price at the time of plugging was sufficient for a profit. With the price increase to $12.32 a barrel by December, 1975 any projection of the economics, based on Mobil's own report of November, 1966 (R.502) which showed that the project would have a life from 10.4 to 14.2 years, from the time of plugging in December, 1971 forward showed that this could have been a very profitable *secondary recovery* operation had Mobil not destroyed the wells.

REASONS FOR GRANTING THE WRIT

I

The Authorizing of The Destruction of These Oil Wells and This Oilfield Without Regard to Secondary or Other Methods of Recovering The Oil by The Injection of Artificial Energy Into The Reservoir Is Very Prejudicial to The Public Interest at This Time of America's Grave Energy Crisis and Is in Violation of Oklahoma Statutory and Common Law Governing Damages for Torts.

The Court may wish to take notice that the U.S.A. is currently incurring grave deficits in its international accounts which to a large extent are occasioned by foreign oil imports which today account for approximately fifty (50%) per cent of the oil consumed in this country.

The Court may wish to take notice that after the *primary* production from an oil reservoir is completed there often remains in the reservoir some eighty (80%) per cent of the oil and if this is to be recovered sophisticated technology must be employed which involves *secondary recovery* by the injection of artificial energy into the reservoir.

Such secondary recovery operations take considerable time and often extend some ten, fifteen, or twenty years in order to recover the great bulk of the oil that remains in the reservoir after completion of primary operations.

The Court of Appeals refused to consider any evidence other than that bearing on primary operations as of the day of the plugging.

This decision authorized the destruction of an oil reservoir containing five million barrels of oil which

obviously could have been produced on a profitable basis using secondary recovery methods.

The next time it may require the destruction of an oilfield containing fifty million barrels and the time after that it may be five billion barrels.

There is no question that there is a great public interest in laws that will permit *secondary recovery* operations to recover the billions of barrels that would otherwise be forever left in the ground under the decision of the Court of Appeals which at page 15 of its opinion (Appendix A at p. 15a) twice stated that this case involves the *public interest.*

It is common knowledge that there are hundreds of thousands of oil wells in Oklahoma alone not to mention the other states covered by the Tenth Circuit and the effect of this decision on other jurisdictions which not only gives the operator whose lease has expired after primary operations the right but also places upon him the *utterly senseless duty* to destroy oilfields and leave behind some eighty (80%) per cent of the oil in the reservoir.

Under this decision any operator whose oil and gas lease on an oilfield has terminated must immediately plug and destroy the wells *regardless* of the protests of the mineral owner, the party with the right to produce the oil, the *de facto* and within a few days later *de jure* lessee, the owner of the steel production casing in the wells and the wellhead equipment, the opinions of engineers expert in the technology required for the secondary recovery operation and the wishes and aspirations of anyone who might have new concepts on how to produce the eighty (80%) per cent of the oil remaining in the reservoir after termination of primary operations.

The logical and inevitable result of this judgment

will be to cause the *premature* plugging of literally thousands of oil wells.

It will result in increasing unemployment and the export of jobs to foreign lands and paying out billions of dollars to Arabian and other oil lands abroad.

This decision will cause substantial detriment to the American public which will be deprived of billions of barrels of otherwise recoverable oil that could be produced by secondary recovery methods.

II

The Judgment of The Court of Appeals is Based Upon A Completely and Totally False Statement of Fact on The Most Fundamental Issue in The Lawsuit and Therefore Should Not Be Permitted to Stand.

At page 14 of its opinion (Appendix A at p. 14a) the Court of Appeals wrote as follows:

> "At the time that Mobil determined to abandon the wells there was NO EVIDENCE that further operations would prove economically feasible." (emphasis supplied)

It is most fundamental law in Oklahoma that no one can destroy an oil well that could be produced in paying quantities at the time of plugging. *Okmulgee Supply Company* v. *Anthis* 187 Okla. 139, 114 P.2d 451 (1940); *Gallaspy* v. *Warner* 324 P.2d 848 (Sup. Ct. Okla. 1958); *Henry* v. *Clay* 274 P.2d 545 (Sup. Ct. Okla. 1954).

Mobil accepted the qualifications of both of Gannon's expert witnesses Messrs. David Dooley (R.213) and Dale Bartlebaugh (R.232).

It is well established under Oklahoma law that the testimony of an expert witness is substantial evidence. *Grison Oil Corp.* v. *Corp. Commission* 99 P.2d 134 (Sup.

Ct. Okla. 1940); *Anderson Prichard Oil Corp.* v. *Corp. Commission* 241 P.2d 363 (Sup. Ct. Okla. 1951).

This Court is in no way called upon to weigh the evidence but merely to briefly examine the record to ascertain that the Court of Appeals based its judgment upon a completely false statement on the most fundamental fact issue in this case.

Both of these expert witnesses testified as to their detailed knowledge of this area and these operations with Mr. Dooley's testimony appearing in the record at pages 213-218 and at page 222 wherein he testified:

> "Q. Mr. Dooley having examined Mobil's evaluation report and leasing records and being familiar with the area and the production of oil from this lease, do you have an opinion at this time about whether or not in November and December of 1971, or January of 1972, oil could have been produced from the Gannon lease in paying quantities?
>
> A. *Yes, it could have paid.*"

Mr. Bartlebaugh's testimony appears in the record at pages 232, 234 and 235 wherein he testified:

> "Q. Do you have an opinion whether or not it was economically feasible to produce this oil at the time Mobil plugged the wells in November and December, 1971?
>
> A. Yes, sir I do.
>
> Q. What is that opinion?
>
> A. *I think it could have been produced on an economically feasible basis.*"

Geyer (R.126, 127) also testified that the wells could have been produced in paying quantities at the time they were plugged. He further testified that his secondary recovery expert, Dr. Phil White of Tejas Engineering, also advised him that the wells could be produced successfully (R.203, 204).

The judgment of the Court of Appeals stands on *"feet of clay"* for it is based upon a completely and totally false statement of fact upon the most fundamental issue at the very heart of this lawsuit.

No judgment so obviously without integrity should be permitted to stand.

III

The Judgments of The Court of Appeals and of The District Court Violated, Contradicted or Ignored Virtually Every Applicable Criterion of Federal and Oklahoma Common and Statutory Law in Order to Take This Case from The Jury and Hold for Mobil.

Many pages could be written on how the District Court deprived Gannon of her "day in Court" however one illustration may suffice.

The most fundamental issue as framed by the Pretrial Order which was signed by both parties and the District Court was whether the wells could have been produced in paying quantities at the time of plugging or subsequent thereto.

Yet the District Court was so unfair to Gannon that it would not even permit her to introduce any evidence on the price of oil (R.222) which was the most significant evidence on the most important issue in the lawsuit.

The Court of Appeals, in an astonishing opinion, disregarded every rule governing appellate review of a directed verdict and particularly that which requires the evidence to be considered in the strongest light in favor of petitioner. *Continental Ore Co.* v. *Union Carbide Corp.* 370 U.S. 690. The Court simply ignored Gannon's evidence and refused to consider it in any light.

It paid no heed to the burden of proof and that it is a rare case that grants a directed verdict for a defendant with such burden. *Wilson* v. *United States* 530 F.2d 772 (8th Cir. 1976).

The Court of Appeals disregarded 23 Okla. Stat. Anno. 1971 §§ 5 and 61 which provide that the plaintiff in a tort action may introduce all evidence of damages up to the time of trial. *Chicago Rock Island and Pacific Railway Co.* v. *Hawes* (Okla. 1967) 424 P.2d 6.

Its decision conflicts with the ruling of the Eighth Circuit on this issue. *Twentieth Century Fox Film Corp.* v. *Brookside Theatre Corp.* 194 F.2d 846 (8th Cir. 1952).

The Court of Appeals contradicted itself on lease termination and then went on to hold that the receipt and retention of royalties by Gannon revived the lease. This contradicts the most explicit Oklahoma law. *Woodruff* v. *Brady* 181 Okla. 105, 72 P.2d 709 (1937); *Jath Oil Co.* v. *Durbin Branch* 490 P.2d 1086 (Okla. 1971).

It ignored the definition of who is the Owner of wells as stated in Definition 37 of Rule 1-101 OCC-OGR and all other laws and facts bearing on ownership which clearly showed Gannon to be the owner of the wells.

It refused to apply fundamental Oklahoma law that there is no duty to plug a well that the owner does not intend to abandon. *Bryan* v. *State* 133 Okla. 213, 271 P 1020 (1928).

Its decision contradicts its own holding that the new lessee (purchaser) by offer in writing may relieve the prior lessee of any duty to plug wells. *U.S.* v. *79.95 Acres of Land* 459 F.2d 185 (10th Cir. 1972).

It not only ignored but wrote contrary to Mobil's admissions of record filed pursuant to the Pretrial Discovery procedures.

It did not consider the right of the mineral owner to

object to the plugging of wells. *Okmulgee Supply Company* v. *Anthis, supra; Amax Petroleum Corp.* v. *Corporation Commission* 552 P.2d 387 (1976).

Gannon proved without contradiction that she was entitled to recover the value of the three wells that were prospect holes for deeper formations in accordance with Oklahoma law. *North Healdton Oil & Gas Co.* v. *Skelley* 59 Okla. 128, 158 P 1180 (Sup. Ct. Okla. 1916).

This was a vital issue agreed to in the Pretrial Order yet the Court of Appeals did not even discuss this part of the case.

The Court of Appeals held that Gannon lost her rights because she did not take any action, steps or threats to prevent Mobil from proceeding with the plugging operations until this lawsuit was filed on October 11, 1973.

As soon as Gannon learned about the plugging on November 17, 1971 she made demand upon Mobil not to plug and Mobil at that time assured Gannon that it would not plug.

As the final plugging was completed on December 8, 1971 there was nothing Gannon could do after that date to prevent plugging.

This action was filed within the two (2) year period for actions for trespass. 12 Okla. Stat. Anno. 1971 § 95. Yet the Court of Appeals arbitrarily shortened the limitations period to three (3) weeks that is from November 17, 1971 to December 8, 1971.

Further, this conflicts with the holding of the Third Circuit that a party loses his standing in Court if he resorts to "threats" of legal action. *Gaudiosi* v. *Mellon* 269 F.2d 873 (3rd. Cir. 1959).

The detriment of this decision to the public is stressed by its *uniqueness* in that never before has a Court permitted even one of the millions of oil wells in Amer-

ica to be destroyed with impunity when there was evidence that it could be produced profitably or was a *bona fide* prospect hole.

This holding writes such disorder and disarray into American judicature that it cries out to this Court for correction.

It deprives the individual Gannon of equal and due process of law for it exempts the Mobil corporation from the legal system.

CONCLUSION

This is a most important energy case which calls for reversal in order to protect the public interest from having oilfields containing billions of barrels of recoverable oil destroyed to the detriment of America at this time of grave energy crisis. Further, no judgment which is based upon a completely and totally false statement of fact upon the most fundamental fact issue in the case should be permitted to stand, particularly as this judgment ignored or contradicted virtually every fact, rule, statute and common law bearing on same in order to take the case from the jury and hold for Mobil thereby injecting such conflicts, contradictions and chaos into the judicial system and causing such gross miscarriage of justice that this Court should exercise its power of supervision.

Respectfully submitted,

FRED G. GANNON
Pro Se
(beneficiary of the estate
represented by petitioner)

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1945

FAYETTA GILBOUGH GANNON, INDIVIDUALLY, AND AS EXECUTRIX AND TRUSTEE OF THE ESTATE OF CLAIR H. GANNON, DECEASED, *Plaintiff-Appellant,* vs. MOBIL OIL COMPANY, A DIVISION OF SOCONY OIL COMPANY, INC., A CORPORATION, *Defendant-Appellee.*	**Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 73-272)**

Submitted: January 26, 1978

Andrew Wilcoxen, Muskogee, Oklahoma, (Fred G. Gannon, Dallas, Texas, on the brief), for Appellant.

Max H. Lawrence of Walker, Lawrence and Walker, Oklahoma City, Oklahoma, and Sid M. Groom, Jr., Edmond, Oklahoma, (David R. Latchford, Mobil Oil Corporation, Denver, Colorado, on the brief), for Appellee.

Before SETH, Chief Judge, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

Appellant, plaintiff below, Fayetta Gilbough Gannon, individually and as Executrix and Trustee of the Estate of Clair H. Gannon, Deceased (Gannon), appeals from a Directed Verdict awarded appellee, defendant below, Mobil Oil Company, a Division of Socony Oil Company, Inc., a corporation (Mobil). Jurisdiction is based on diversity.

Gannon sued Mobil for both compensatory and exemplary damages predicated upon Mobil's alleged torts of trespass and intentional interference with Gannon's contractual rights under an oil and gas lease granted January 7, 1972, arising by reason of the plugging of certain abandoned oil wells on the Gannon property by Mobil. The trial court entered a detailed memorandum of findings and conclusions concurrent with the judgment granting the directed verdict.

On October 14, 1959, Gannon executed an oil and gas lease to Mobil covering 570 acres situate in Murray County, Oklahoma, for a primary term of ten years or so long as oil, gas or other hydrocarbons were produced therefrom. There were six non-producing oil wells located on the lands at that time, completed in the Second Bromide Sand. Mobil or its assignee-agent re-entered five of the six wells and, in addition, drilled and completed one more well to the Bromide Sand. Mobil also undertook an extensive "fireflood" operation in an effort to obtain commercial production of the low gravity oil in the reservoir, but terminated the uneconomic operation in October, 1966. On August 3, 1967, Mobil "farmed out" the wells by partial assignment of its leasehold rights for a term of three (3) years to Nelson I. Geyer (Geyer), d/b/a/ Thermo-Dyne, Inc. Geyer undertook an injection of oil condensate commencing in April of 1968 in an effort to revive production from the lease at a total cost of about $200,000.00. His efforts, just as

those of Mobil, were unsuccessful in terms of realizing commercial production. Geyer produced a total of 9,982.35 barrels of oil and condensate, most of which, however, had been injected in the wells. Geyer's right under the partial assignment expired December 24, 1970, at which time he terminated all efforts to obtain commercial or "economic" production. Thus, the basic lease also terminated, at the latest possible date, on December 24, 1970.

Mobil determined to abandon the Gannon lease and to plug the wells. Thereafter, it commenced plugging and abandonment operations in July, 1971. Geyer by letter of August, 1971, offered to relieve Mobil of any obligations relating to the plugging of the wells. Geyer informed Mobil of his desire to assume the responsibility of plugging the wells and purchasing Mobil's equipment at a "nominal" fee and then pursuing attempts to obtain a new oil and gas lease from Gannon. Mobil, however, declined the Geyer offer both because Mobil had been advised that it could not make any assurances as to whether its lease from Gannon was then valid and because "*. . . it would be difficult for Thermo-Dyne [Geyer] to indemnify Mobil against all liability as the result of sale of equipment and assumption of plugging and abandoning the wells.*" [Pl. Exh. #11, R., Vol. III, p. 513.] Mobil continued with the plugging process and notified Geyer to remove the equipment from the wells which belonged to him.

On November 1, 1971, Gannon wrote to Mobil inquiring about Mobil's intentions relative to the property. Mobil informed Gannon that it was then in the process of plugging [and abandoning] the wells. Gannon's attorney then spoke by telephone with a Mobil representative, advising that Gannon was then negotiating with Geyer for a new oil and gas lease on the

property *and that Gannon was the owner of the wells rather than Mobil. He demanded that Mobil not plug the wells.* [R., Vol. I, pp. 36-38.]

Mobil's landman, one C. H. Bland, did receive a telephone call from Gannon's attorney relative to the plugging operation. Bland did not recollect the specifics of the conversation except that it did deal with the plugging operation. Bland testified that he informed Gannon's attorney that he was not familiar with well plugging matters. Gannon's attorney, however, testified that Bland [whom he seems to equate as Mobil] stated that the wells would not be plugged. In any event, the record reflects that even though Mobil proceeded with the plugging operations by pouring hundreds of sacks of cement into the oil producing formation, cementing steel tubing and iron into each well and filling each well from top to bottom with cement that neither Gannon, her attorney or any person on her behalf undertook action, steps or threats to prevent Mobil from proceeding with the plugging operations until the instant lawsuit was filed on October 11, 1973.

Mobil filed its Notice of Intention to Plug the subject wells with the Oklahoma Corporation Commission prior to commencement of the plugging operations in July, 1971. The record reflects that Geyer's efforts under the three year partial assignment of December 29, 1967, realized only limited production from the wells for April, 1968, through February, 1969. Some production was last sold from the lease by Geyer in September, 1971. Mobil had, of course, assigned only the right to production from the Second Bromide Sand to Geyer for the three (3) year term, reserving all other leasehold rights, together with all of the attendant duties, obligations and responsibilities imposed by virtue of such ownership.

Mobil completed the plugging operations on December 8, 1971. Geyer, who had obtained a new oil and gas lease from Gannon on the property for a three-year term commencing January 7, 1972, attempted to re-enter one of the wells plugged by Mobil but was unable to drill out the steel and iron which had been cemented into the hole. Geyer also completed a new well in the Second Bromide Sand in August, 1974, and thereafter re-entered one of the wells plugged by Mobil, but gave up that effort. Geyer testified that in his opinion it would cost between $40,000.00 and $50,000.00 to re-enter the plugged wells because of the tail pipe and iron in the holes but that a prudent operator would prefer to spend $100,000.00 per well in drilling new wells rather than attempting to overcome the hazards of re-entry of the abandoned wells. [R., Vol. I, pp. 137, 141-144.]

Gannon acknowledges that it was not economically feasible for Mobil to produce the low gravity oil in 1966. However she contends that when Mobil commenced the plugging operation in 1971 the oil from the wells could have been produced in paying quantities because of the rapid increase in the price of crude oil. The trial court excluded evidence of the economics prevailing at the time of trial in June of 1976.

On appeal, Gannon contends that the trial court erred in granting the directed verdict by finding that: (1), (2) and (3), Gannon could not amend her complaint and the pre-trial order; Gannon had to plead and prove affirmative defenses to justify torts; Mobil's lease did not terminate until December 8, 1971, (4) Mobil was the "owner" and "operator" of the subject wells at the time it plugged same as such terms are defined by the rules and regulations of the Oklahoma Corporation Commission, (5) the wells were not prospect holes and the law

applicable to the destruction of same did not apply, (6) the wells could not be produced in paying quantities at the time of the plugging operations, and thus erred in excluding evidence of the economics of producing the wells subsequent thereto and up to the time of trial, (7) the assignment of the wells and lease insofar as it covered the oil sand in which the wells were completed did not relieve Mobil of whatever duty, if any, it may ever have had to plug the wells, (8) Mobil had a duty to plug the wells in view of the facts prevailing at the time of plugging and Rule 3-401(c), (9) certain facts controlled, (10) certain conclusions of law applied, (11) evidence pertinent to exemplary damages be excluded, and (12) Gannon's motion for directed verdict should be denied.

Geyer's testimony was most pertinent to the trial court's decision. He stated that in October or November of 1971 the type of sour crude being produced from the Gannon lease would sell for about $2.50 per barrel, after blending; that in order to render it marketable it would have cost much more than the sale price; and that his company lost about $400,000.00 in the process of the two operations conducted on the Gannon property. Even so, Geyer said that he was ". . . ready to lose a couple of hundred [thousand] more." [R., Vol. I Supp., p. 134-136.] As to the question of the validity of Mobil's lease after Geyer's unsuccessful efforts, Geyer acknowledged that on August 23, 1971, his efforts had been unsuccessful in producing from the Gannon lease "to the point of economics." He further stated that while he would like to continue "with a research program" on the property, his attorneys advised that there was a question about the validity of the Mobil lease in that although Geyer had produced a "limited amount" of oil during 1970 and 1971, still this was "perhaps not

enough to hold the lease by production." [R., Pl. Ex. #10, Vol. III, p. 512.]

Following trial and oral arguments, the trial court considered the respective motions for directed verdict. The court found that as a result of the partial assignment from Mobil to Geyer and the attendant contractual arrangement between them, that the work ". . . performed by the farm-out agreement of Geyer was in truth and in fact the work and services trying to produce oil for . . . Mobil . . . they were associates and partners to the degree set out in their agreement." [R., Vol. I, pp. 315, 316.] Thus, the court recognized Mobil's continuing obligation to plug abandoned wells on the Gannon leasehold property. Reaching over to the "significant" period of September 3, 1971, the court observed that while Geyer had contacted Mobil regarding his desire to continue operations on the Gannon lease, Mobil rejected this request both because Mobil could make no assurances that its lease was still valid and because Mobil did not believe that Thermo-Dyne [Geyer] was financially capable of indemnifying Mobil against all liability with respect to the obligation of plugging and abandoning the wells and purchasing Mobil's equipment. [R., Vol. I, p. 317.] When it became clear, as the trial court found it to be as a matter of law, that Mobil was obligated to plug and abandon the wells (and when Mobil had in fact commenced those operations) Gannon did nothing to stop those operations in order ". . . to save himself from damages he now claims [to have] suffered." [R., Vol. I, pp. 317-319.]

In regard to Mobil's lease termination, the trial court pointedly referred to a letter directed to Mobil by Gannon's attorney after Gannon was informed of Mobil's intention to plug and abandon the subject wells wherein it was stated that, "It is our understanding

that this property has been dormant. However, during the months of August, 1971, and September, 1971, small royalties were paid and apparently sold from the lease." [R., Vol. I, pp. 318, 319.] The trial court concluded therefrom that the receipt and retention of the royalty payments aforesaid were recognition by Gannon that such proceeds were then paid from operation of the lease and thus that the lease was then viable in the name of Mobil. [R., Vol. I, pp. 318, 319.]

In its formal findings of fact and conclusions of law, the trial court reviewed the factual background together with the statutory and regulatory laws of Oklahoma relating to the right and duty to plug abandoned oil wells. The court specially found that Mobil was the owner and operator of the wells on the lease at the end of the Geyer farm-out and that Mobil had the duty, liability and responsibility to plug the wells and that the partial assignment to Geyer did not relieve Mobil of this responsibility. [R., Vol. II, pp. 480, 481.] The court concluded, having considered the evidence in the light most favorable to Gannon, that " . . . the evidence supported but one conclusion with which reasonable men could not disagree." [R., Vol. II, pp. 484, 485.] We agree.

I.

The critical, dispositive issue, found as controlling by the trial court, is: that Mobil was, at all times involved, the owner and operator of the wells on the Gannon lease and that at the end of the Geyer farm-out operations Mobil had the duty, liability and responsibility to plug the wells which had then been abandoned. We agree with the trial court's analysis of the facts and the applicable law.

Oklahoma law provides that upon abandonment of an oil well the owner or operator is obligated, responsible and liable for plugging the well in accordance with the applicable rules of the Corporation Commission. 17 Okla. Stat. Ann. 1971 §53; 52 Okla. Stat. Ann. 1971, §§862, 273, 309 and 310; OCC-OGR §3-401(a); Loriaux v. Corporation Commission, 514 P.2d 941 (Okla. 1973); United States v. 79.95 Acres of Land, etc., Rogers Co., Okl., 459 F.2d 185 (10th Cir. 1972); Bryan v. State, 133 Okla. 213, 271 P. 1020 (1928).

The Oklahoma Corporation Commission was created by Art. IX of the Oklahoma Constitution in 1907. Under present day statutes, the Commission has broad power to prescribe rules and regulations governing the plugging of all abandoned oil and gas wells. Such rules and regulations provide, *inter-alia,* that: Each well in which production casing has been run, but which has not been operated for six months and each well in which no production casing has been run, but for which drilling operations have ceased for thirty consecutive days shall be immediately plugged, OCC-OGR §3-401(b); each well must be plugged in a manner recognized as good and accepted practices and standards in the industry, OCC-OGR §3-404(b); any person who drills or operates any well for exploration, development, or production of oil or gas is required to furnish, on forms approved by the Commission, an agreement in writing to drill, operate, and plug wells in compliance with the rules and regulations and to submit a semi-annual financial statement showing that his net worth (in Oklahoma) is not less than $10,000.00; *the owner and operator of any oil or gas well, whether cased or uncased, is jointly and severally liable and responsible for the plugging thereof in accordance with the rules and regulations as to abandonment and plug-*

ging prescribed by the Oil and Gas Conservation Division, OCC-OGR §3-401(a). The authority of the Oklahoma Corporation Commission, under the governing statutes, has been consistently recognized in the rule making area to be that of promulgating rules requiring adequate and proper plugging and abandonment of an oil and gas well under the state's police power in order to prevent waste and pollution and to provide for the safety of the public generally. Wakefield v. State, 306 P.2d 305 (Okla. 1957); Sheridan Oil Company v. Wall, 187 Okla. 398, 103 P.2d 507 (1940); Magnolia Petroleum v. Witcher, 141 Okla. 139, 284 P. 297 (1930). Thus, the duty and liability to plug arises when an oil and gas well is abandoned or taken out of production. The essence of the concept of abandonment is aimed principally at preventing fugacious materials in the various strata pierced by the well from entering the bore so as to permit its movement into other strata or onto the surface. Significantly, Oklahoma has recognized a common-law duty to plug. Sheridan Oil Company v. Wall, *supra.*

We view it as significant that OCC-OGR §3-407 is the only regulation relating directly to the landowner's utilization of an abandoned oil or gas well. It provides that if such a well may safely be used to provide fresh water and such utilization is desired by the landowners, the cement plug, extending 50 feet into the surface casing, shall be set, except that the top thirty foot plug need not be set, provided that written authority for such use is secured from the landowner and filed with the Commission's plugging record. This relieves the operator *only* of the responsibility above the thirty foot plug. OCC-OGR §3-407.

Sheridan Oil Co. v. Wall, *supra,* holds that a lessee who abandons an oil well without proper plugging

stands in the position of a tenant who surrenders the premises without making the necessary repairs. The court there awarded the landowner recovery against the lessee for the costs of re-plugging the abandoned oil well in order to prevent pollution.

Loriaux v. Corporation Commission, *supra,* holds that the owner and operator of oil and gas leases upon which wells had been drilled is obligated to plug abandoned wells, despite an assignment of the leases, where the wells were found to have been abandoned prior thereto. And, in an action to recover damages resulting from an alleged improperly plugged well, it has been held that the causal connection can be established from circumstantial evidence and that the question of negligence and proximate cause of the injury or damage is one for jury determination. Sunray Mid-Continent Oil Co. v. Tisdale, 366 P.2d 614 (Okla. 1961). *See also:* Salmon Corporation v. Forest Oil Corporation, 536 P.2d 909 (Okla. 1974).

Thus, just as the trial court found, the Oklahoma authorities above cited, when considered in the light of the facts reflected in the record before us, fully support these conclusions: that all operators are responsible for proper plugging of abandoned oil and gas wells for the protection of the surface and subsurface strata; that cessation of production with no intent to continue operations evidences abandonment; that Mobil was the owner and operator of the wells on the Gannon lease when Geyer's rights expired under his partial assignment contract and that Mobil was, as such owner and operator, obligated by law to plug the wells.

A decision of particular relevance, we believe, is that of Amax Petroleum Corporation v. Corporation Commission, 552 P.2d 387 (Okla. 1976), involving an action brought against Amax to require it to plug cer-

tain gas wells. By various assignments, Amax became the owner of an oil and gas lease upon which several gas wells had been previously drilled, developed and operated. In 1957 or 1958, Amax determined to abandon these wells and the field of which they were a part. No production had been realized from the wells after 1957. On July 28, 1959, about two years after the gas wells were shut in, Amax assigned the oil and gas lease upon which the wells were drilled back to the landowners, an elderly couple, neither of whom had been engaged in the oil and gas industry (or had at any time operated oil or gas wells). The landowners died within one year following re-assignment. Their daughter became the owner of the property. The Commission ordered that Amax plug the wells. Amax refused, contending that the Commission order was invalid because, (a) the Commission had no authority to require the plugging of any oil or gas well which has not been abandoned or permanently abandoned and (b) that there was no evidence that the wells had been abandoned or permanently abandoned *prior* to the date Amax assigned the lease back to the original landowners-lessors. The Court held that the re-assignment from Amax to the landowners did not have the legal effect contended by Amax. In 1973 the Commission's field inspector found some of the wells had not been properly plugged since their abandonment in 1959. In pertinent part, the Court held that the re-assignment of the lease from Amax to the original landowners did not relieve Amax of its duty to plug the wells:

> While the statute could be more specific, the things about which it could be more specific are certainly implicit in the statute. *Thus, the person to plug the well is the lease operator, not a stranger to the operation; and the time to plug is when the well is abandoned and certainly not before.* We would assume that a definition of abandonment would add little to resolving specific fact situations where, as here, a question is raised as to whether abandonment has occurred or not.
> 552 P.2d, at 391, 392.

In the case at bar there can be no dispute that Mobil clearly announced its intention to relinquish the wells and the lease premises. Thus, Mobil's intention was affirmatively declared. Such acts constitute a relinquishment of the premises. *See:* Dow v. Worley, 126 Okla. 175, 256 P. 56 (1926); Carter Oil Co. v. Mitchell, 100 F.2d 945 (10th Cir. 1939); 1 Am. Jur. 2d §§1, 39 and 40. Under Oklahoma decisions, the "abandonment" of an oil and gas lease comes about with a concurrence of an intention to abandon and the act of physical relinquishment. Magnolia Petroleum Co. v. St. Louis-San Francisco Ry. Co., 194 Okla. 435, 152 P.2d 367 (1944).

While cessation of operations under an oil and gas lease is not alone sufficient to establish abandonment [Fisher v. Dixon, 188 Okla. 7, 105 P.2d 776 (1940)], it has been held that an unreasonable delay by the lessee in undertaking further exploration coupled with the lessee's declaration that further drilling would be unprofitable is sufficient evidence to establish abandonment. Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 P. 33 (1926). *See also:* Doss Oil Royalty Company v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1943); Dow v. Worley, *supra*. Both elements were clearly established on the part of Mobil in the instant case.

II.

We have carefully considered the additional allegations of trial court error urged by Gannon. We hold that they are individually and collectively without merit. For the most part they have been effectively disposed of adversely to Gannon in our discussion of the facts, contentions and legal principles.

At the time that Mobil determined to abandon the wells there was no evidence that further operations would prove economically feasible. It matters not that a change in the market value of the crude oil at some future time (here, as alleged, at the time of trial) *may have then* dictated additional operations rather than abandonment. Gannon's own expert, Geyer, acknowledged that the wells and the operations had proven uneconomic at the time Mobil declared its intention to plug the wells and abandon the property. Furthermore, Geyer testified that the method and technique employed by Mobil in plugging was well done. There were others, of course, who testified otherwise. No reference is made that the Oklahoma Corporation Commission has at any time or in anywise challenged Mobil's method of plugging the wells on the Gannon property. We are puzzled by Gannon's allegation that Mobil was a "trespasser" when it entered upon the premises to plug the wells because the lease had terminated. Gannon contends that Mobil had no right to enter upon the premises after the oil and gas lease terminated and then to "destroy . . . wells to which it had no right." [Brief of Appellant, p. 50.] Even though the trial court found — with substantial support in the record — that Mobil's lease had not terminated when it commenced plugging operations, we believe that if Gannon's contention were to prevail it could very likely render

Oklahoma's statutory and regulatory mandates requiring plugging of abandoned wells in order to protect the public interest ambiguous to the extent that an operator such as Mobil might contend, following simple termination of the lease, that it has been relieved of the statutory, regulatory and common law obligation and responsibility to plug the wells. Such a result is not countenanced under Oklahoma law. It would not serve the public interest.

WE AFFIRM.

APPENDIX B

MARCH TERM — MAY 3, 1978

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable Monroe G. McKay, Circuit Judges

FAYETTA GILBOUGH GANNON, INDIVIDUALLY, AND AS EXECUTRIX AND TRUSTEE OF THE ESTATE OF CLAIR H. GANNON, DECEASED,	)	
Plaintiff-Appellant,	)	**No. 76-1945**
vs.	)	
MOBIL OIL COMPANY, A DIVISION OF SOCONY OIL COMPANY, INC., A CORPORATION,	)	
Defendant-Appellee.	)	

This matter comes on for consideration of the motions and responses relating to appellant's petition for rehearing and for clarification in the captioned cause, including the suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. The appellant's petition for rehearing is permitted to be filed as of April 14, 1978. The petition for rehearing en banc and for clarification is permitted to be filed as of April 21, 1978.

2. The petition for rehearing is denied by the panel of Circuit Judges Seth, Barrett and McKay to whom the cause was argued and submitted.

No judge in regular active service or a judge who was a member of the panel that rendered the decision sought to be

reheard having requested a vote of such suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion is denied.

HOWARD K. PHILLIPS, Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By

Stephanie Schetrom
Deputy Clerk

APPENDIX C

MARCH TERM — MAY 5, 1978

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable Monroe G. McKay, Circuit Judges

FAYETTA GILBOUGH GANNON, INDIVIDUALLY, AND AS EXECUTRIX AND TRUSTEE OF THE ESTATE OF CLAIR H. GANNON, DECEASED,	)	
Plaintiff-Appellant,	)	**No. 76-1945**
vs.	)	
MOBIL OIL COMPANY, A DIVISION OF SOCONY OIL COMPANY, INC., A CORPORATION,	)	
Defendant-Appellee.	)	

This matter comes on for further consideration of the order entered May 3, 1978 in the captioned cause.

By clerical oversight the order failed to deny the motion for clarification of the captioned cause.

Upon consideration whereof, it is ordered that appellant's motion for clarification is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

FAYETTA GILBOUGH GANNON, INDIVIDUALLY, AND AS EXECUTRIX AND TRUSTEE OF THE ESTATE OF CLAIR H. GANNON, DECEASED,	)	
Plaintiff	)	**No. CIV-73-272**
vs.	)	
MOBIL OIL COMPANY, A DIVISION OF SOCONY OIL COMPANY, INC., A CORPORATION,	)	
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DIRECTED VERDICT

This cause came on for trial on June 14, 1976, before the Court and jury, both parties being present by their attorneys. The issues have been duly tried and both plaintiff and defendant have concluded their case through the presentation of evidence. At the close of the evidence for the plaintiff, the defendant moved for a directed verdict for the reason that the evidence of plaintiff was insufficient to support a cause of action against this defendant. The Court took the motion under advisement and the defendant made its presentation of evidence, and thereupon renewed its motion for a directed verdict. The plaintiff also moved for a directed verdict as to liability.

Having fully considered the arguments of counsel and after a review of all the evidence in the case, the Court concludes that the motion of plaintiff should be denied, and that motion of defendant for a directed verdict should be sustained.

The Court finds that the following are undisputed facts covered by the stipulation between the parties filed in this cause and the evidence:

FINDINGS OF FACT

1. Plaintiff executed an oil and gas lease on October 14, 1959, to defendant covering the subject lands granting it the exclusive right to explore for and produce oil and gas, which lease was for a primary term of ten years and so long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products were produced therefrom, (Plf's Exhibit 1).

2. The oil and gas lease remained in force and effect through production of hydrocarbons by defendant and its partial assignee, Nelson I. Geyer d/b/a Thermo-Dyne, Inc. (expert in low gravity oil production), royalties on which were paid by defendant and accepted by plaintiff, (Plf's Exhibit 5).

3. On August 3, 1967, defendant agreed to partially assign the oil and gas lease for primary operation of the wells located thereon as to the Second Bromide Sand, (Plf's Exhibit 6). Thereafter, on December 24, 1967, defendant executed a partial assignment of the oil and gas lease for only three years, at which time the interest would revert to Mobil unless the parties entered into a further agreement, and defendant reserved all interest above and below the Second Bromide Sand, (Plf's Exhibit 9).

4. Defendant's partial assignee, Nelson I. Geyer, produced a total of 9,982.35 barrels of oil and condensate beginning in April, 1968, a majority of which was hydrocarbons bought by Geyer and injected in the wells, (Plf's Exhibit 7; Geyer Deposition p. 20, 100). All rights to Geyer expired on December 24, 1970 (Plf's Exhibit 9; Geyer Deposition p. 34). Mr. Geyer spent $200,000 in trying to produce the lease during the three-year term of the limited assignment, (Geyer Deposition p. 136). Mr. Geyer was unsuccessful in producing the lease to the point of economics, (Plf's Exhibit 10). The defendant, Mobil Oil Company, was unable to establish satisfactory production from the lease, (Plf's Exhibits 3 & 16).

5. Plaintiff failed to introduce any evidence to sustain the allegation that the defendant had abandoned the subject oil and gas lease. Further, the undisputed evidence introduced by defendant without objection by the plaintiff showed that the defendant did not to any degree form an intention to abandon the lease until July, 1971, at which time the plugging and abandonment operations were commenced, and thereafter prosecuted to completion on December 8, 1971, (Plf's Exhibit 18; Testimony of C. R. Benkley and C. M. Rhodes).

6. The defendant Mobil Oil Company was in the process of plugging and abandoning the leases on August 23, 1971, (Plf's Exhibit 10). Thermo-Dyne, Inc. (Nelson I. Geyer) offered to Mobil to assume the responsibility of plugging and abandoning this lease, (Plf's Exhibit 10) but Mobil declined the offer because "... it would be difficult for Thermo-Dyne to indemnify Mobil against all liability as the result of sale of equipment and assumption of plugging and abandoning the wells." (Plf's Exhibit 11). Mobil continued the process of plugging and abandoning and advised Thermo-Dyne, Inc. to

"start moving that equipment that belongs to them." (Plf's Exhibits 13, 16 & 18).

7. On November 1, 1971, counsel for plaintiff inquired of Mobil regarding the status of the lease (Plf's Exhibit 15) and Mobil replied on November 9, 1971, that it was in the process of plugging the wells and cleaning up the property, (Plf's Exhibit 16).

8. Neither plaintiff nor her counsel took any action at law or equity with respect to this lease in order to stop the plugging and clean-up operations until this action was filed on October 11, 1973.

9. The defendant Mobil Oil Company was an owner and an operator of the oil and gas, and injection wells located on the oil and gas lease, and it retained those rights until termination of the lease, (Plf's Exhibits 5, 6 and 9).

10. Notice of Intention to Plug was timely filed with the Oklahoma Corporation Commission, (Testimony of C. R. Benkley and Arnold Park). Mobil began plans to plug and abandon in July, 1971, (Testimony of C. R. Benkley). Mobil plugged the wells in a manner to insure that the old wells would no longer leak oil, gas, salt water, etc. to the surface (Geyer Deposition p. 54) using cement to seal off the oil and gas producing formations and to seal off the fresh water sands and prevent migration of fluids to the surface, all in keeping with Oklahoma plugging laws, (Plf's Exhibit 18; Geyer Deposition pp. 56, 57, 109, 110 and 111). The wells were plugged in conformity with the requirements of the Oklahoma Corporation Commission, (Plf's Exhibit 18; Geyer Deposition p. 107; Testimony of Arnold Park). Nelson Geyer stated that Mobil acted as a reasonable and prudent operator in the plugging of the wells on the lease, (Geyer Deposition pp. 110, 111) which was at a cost of $51,000 to Mobil for the plugging and clean-up

operations, (Testimony of C. R. Benkley). This expenditure to make sure the wells were properly plugged shows good faith of defendant and certainly no ill will to plaintiff or landowner.

11. Since 1919, six other oil and gas operators or lessees have attempted to produce oil and gas in commercial quantities economically from this property and none have succeeded, (Plf's Exhibit 3; Testimony of David Dooley and Dale Bartlebaugh).

12. Finally, plaintiff executed an oil and gas lease beginning January 7, 1972, to Thermo-Dyne, Inc. Thereafter, Thermo-Dyne, Inc., without any unusual difficulty, cleaned out one of the wells Mobil had plugged and further tested the area, and neither Mobil nor Geyer was able to produce oil or gas in commercial quantities economically, (Plf's Exhibits 3 & 16; Geyer Deposition pp. 133-136). There is no proof that all of the other wells plugged by Mobil could not have been re-entered.

CONCLUSIONS OF LAW

1. *The right and duty to plug exists by force of law, both statutory and by Rule 3-401 of the Rules of the Oklahoma Corporation Commission.* Title 17, Okla. Stat. 1971 §53 states:

> "The Corporation Commission is hereby authorized to prescribe rules and regulations for the plugging of all abandoned oil and gas wells. The same shall be plugged under the direction and supervision of the conservation agents of the Corporation Commission as may be prescribed by the Corporation Commission. . . ."

and, Title 52 Okla. Stat. 1971 §86.2 states:

> "The term 'waste', as applied to the production of oil, in addition to its ordinary meaning, shall

include economic waste, under-ground waste, including water encroachment in the oil or gas producing purposes by means or methods that unreasonably interfere with obtaining from the common source of supply the largest ultimate recovery of oil; surface waste and waste incident to the production of oil in excess of transportation or marketing facilities or reasonable market demands. The production of oil in the State of Oklahoma in such manner and under such conditions as to constitute waste as in this Act defined is hereby prohibited, and the Commission shall have authority, and is charged with the duty, to make rules, regulations, and orders for the prevention of such waste, and for the protection of all fresh water strata and oil or gas bearing strata encountered in any well drilled for oil or gas."

as well as Title 52 Okla. Stat. 1971 §273, which establishes that:

"The term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The Corporation Commission shall have authority to make rules and regulations for the prevention of such wastes, and for the protection of all fresh water strata, and oil and gas bearing strata, encountered in any well drilled for oil."

Pursuant to statutory grants, Oklahoma Corporation Rules in force during 1971 declare:

"1-100. CITATION — EFFECTIVE DATE

(a) These Rules shall be cited as O.C.C. - O.G.R.

(b) The effective date of these Rules shall be January 1, 1971.

1-101. DEFINITIONS.

These definitions are provided for the sole purpose of proper interpretation of Corporation Commission rules and regulations:

. . .

7. Common Source of Supply or Pool — The term 'common source of supply' shall comprise and include that area which is underlaid, or which from geological or other scientific data, or from drilling operation, or other evidence appears to be underlaid, by a common accumulation of oil and/or gas; provided that, if any such area is underlaid, or appears from geological or other scientific data or from drilling operations or other evidence, to be underlaid by more than one common accumulation of oil or gas separated from each other by strata or earth and not connected with each other, then such area shall as to each said common accumulation of oil or gas be deemed a separate common source of supply (52 O.S.A., §86.1(c).

. . .

14. Deleterious Substances shall mean any chemical, salt water, oil field brine, waste oil, waste emulsified oil, basic sediment, mud or injurious substances produced or used in the drilling, development, producing, transportation, refining and processing of oil.

15. Development shall mean any work which actively looks toward bringing in production, such as erecting rigs, building tankage, drilling wells, etc.

. . .

19. Fresh Water shall mean surface and subsurface water in its natural state, useful for domestic livestock, irrigation, industrial, municipal and recreational purposes and which will support aquatic life.

. . .

35. Operator shall mean the person who is duly authorized and in charge of the development of a lease or the operation of a producing property.

. . .

37. *Owner shall mean the person or persons who have the right to drill into and to produce from any common source of supply, and to appropriate the production either for himself, or for himself and others.*

. . .

39. *Plug shall mean the closing off, in a manner prescribed by the Commission, of all oil, gas and waterbearing formations in any producing or non-producing well-bore before such well is abandoned.*

40. Pollution is the contamination of fresh water, either surface or sub-surface by salt water, mineral brines, waste oil, oil, gas and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing, refining, transporting or processing of oil or gas within the State of Oklahoma.

. . .

44. Producer — See 'Operator' or 'Owner'." (emphasis added)

"3-400. ABANDONMENT AND PLUGGING OF WELLS."

"3-401. SCOPE

(a) *The owner and operator of any oil, gas, disposal, injection or other service well, or any seismic, core or other exploratory hole, whether cased or uncased, shall be jointly and severally liable and responsible for the plugging thereof in accordance with these rules.*

(b) *Each well in which production casing has been run, but which has not been operated for six (6) months; and each well in which no production casing has been run, and for which drilling operations have ceased for thirty (30) consecutive days, shall be immediately plugged. Each well shall be immediately plugged before it is abandoned.*

(c) The Director of Conservation may, for good cause, grant reasonable extensions of time within which to plug a well.

3-402. NOTICE.

A separate 'Notification of Intention to Plug' for each well shall be filed, in duplicate, with the Conservation Division on Form 1001 at least five (5) days prior to the commencement of plugging operations. The Director of Conservation may waive or reduce the five day notice requirement whenever a qualified representative of the Conservation Division is available to supervise the plugging operation.

3-403. SUPERVISION AND WITNESSING.

Each plugging operation shall be conducted under the supervision of an authorized representative of the Conservation Division. The plugging operator shall notify the appropriate District Office of the Conservation Division of the exact time or times during which all plugging operations will take place within sufficient time to enable a representative of the Conservation Division to be present.

3-404. METHOD OF PLUGGING.

(a) The provisions and requirements of this rule shall govern the plugging of all wells drilled for oil or gas purposes, including oil and gas wells, dry holes, water, gas or other injection wells, salt water supply or disposal wells or other service wells. They shall likewise apply to the plugging of the lower formations in a well which is plugged back to a shallower formation.

(b) *The specific procedures and requirements of this rule are minimum requirements. Every well shall be plugged in such manner as will permanently prevent the migration of oil, gas, salt water or other fluids into or out of any productive formation by*

means of the well bore, and to protect all fresh water strata encountered in the well from contamination or escape of water therefrom. The methods and materials used shall conform to good and accepted practices and standards in the industry.

(c) The term 'mud' as used herein shall mean mud of not less than thirty-six (36) viscosity (A.P.I. Full Funnel Method) and a weight of not less than (9) pounds per gallon. Unless otherwise specified, the injection of cement into the well shall be by the tubing and pump method or the pump and plug method. 'Productive formation' shall mean any formation encountered in the well which is known to contain oil or gas, or which is permeably connected or otherwise in communication with a formation or formations known to contain oil or gas in the same general area. Multiple zones or lenses constituting a common source of supply of oil or gas shall be regarded as one productive formation.

(d) Before any casing is removed from a well, all salt water and oil in the well shall be removed or displaced and the well shall be filled with mud. As the casing is removed the well shall be kept filled with mud.

(e) Any uncased hole below the shoe of any casing to be left in the well shall be filled with cement to a depth of at least fifty (50) feet below the shoe of the casing, or the bottom of the hole, and the casing above the shoe shall be filled with cement to at least fifty (50) feet above the shoe of the casing. If the well is completed with a screen or liner and the screen or liner is not removed, the well bore shall be filled with cement from the base of the screen or liner to at least fifty (50) feet above the top of the screen or liner.

(f) *Each productive formation shall be sealed off from the well bore above and below such formation by filling the well bore with cement from a point fifty (50) feet below the base of the formation to a*

point fifty (50) feet above the base of the formation, and from a point fifty (50) feet below the top of the formation to a point fifty (50) feet above the top of the formation, provided that, (1) if the productive formation is already sealed off from the well bore with adequate casing and casing is not to be removed from the well, these requirements shall not apply, and (2) if the only openings from the productive formation in the well bore are perforations in the casing, and if the annulus between the casing and the outer walls of the well is filled with cement for a distance of fifty (50) feet below the base of the formation and a distance of fifty (50) feet above the top of the formation, then a bridge plug capped with ten (10) feet of cement set at the top of the producing formation is authorized. The placing of the cement on top of a bridge plug may be the bailor method.

(g) *All fresh water strata encountered in the well shall be sealed off and protected by adequate casing extending from a point at least fifty (50) feet below the base of the lowest fresh water strata to within three (3) feet of the top of the well bore and by completely filling the annular space behind such casing with cement.* If the surface or other casing in the well meets these requirements, a cement plug may be set at least fifty (50) feet below the shoe of the casing and extend at least fifty (50) feet above the shoe of the casing. If the casing and cement behind the casing does not meet the requirements of this subsection, the well bore shall be filled with cement from a point fifty (50) feet below the base of the lowest fresh water strata to a point fifty (50) feet above the shoe of the surface pipe. The top thirty (30) feet of the well bore below three (3) feet of the surface of the ground shall, in all events, be filled with cement.

(h) all intervals between cement plugs in the well bore shall be filled with mud.

(i) Any 'rat or mouse hole' used in the drilling

of a well with rotary tools shall be filled with mud to a point eight (8) feet below the ground level and with cement from such point to a point three (3) feet below the ground level and filled in with earth above the top of the cement.

(j) The top of the plug of any plugged well shall show clearly, by permanent markings inscribed or embedded in the cement, the well number and date of plugging.

3-405. PLUGGING RECORD.

Within fifteen (15) days after a well has been plugged, the owner or operator shall file a Plugging Record, in duplicate, with the District Office on Form 1003. If there is not a complete and correct log on the well on file with the Commission, then the owner at the time of plugging shall furnish and file a complete and correct log thereof, or the best information available." (emphasis added)

The evidence showed the rules to have been satisfied in all particulars.

The undisputed facts show that the defendant was an owner and operator at all relevant times of oil and gas wells on the premises and that, under the Statutes of Oklahoma and the Rules of the Oklahoma Corporation Commission above quoted, it had the right and duty to plug the wells, known to have leaked oil and deleterious, polluting substances to the surface for many years, (testimony of Burke Healey) using the methods and manner which it did in order to seal off the productive formation so as to permanently prevent the migration of oil, gas, salt water or other fluids into or out of the productive formation and to protect all fresh water strata from contamination and pollution. Plaintiff failed to introduce any evidence that the methods and manner of plugging by defendant were excessive or that methods and manner of plugging utilized by defendant were not necessary to avoid contamination of

the surface and the fresh water strata or that defendant acted in bad faith.

2. The defendant Mobil Oil Corporation was an owner and operator of the wells on the lease at the end of the Nelson Geyer farmout, and *it had the duty, liability and responsibility to plug the wells.* The partial assignment to Nelson Geyer (Thermo-Dyne, Inc.) did not relieve it of this duty, liability and responsibility. *Loriaux* v. *Corporation Commission,* 514 P.2d 941 (Okla. 1973); *United States* v. *79.95 Acres of Land, etc. Rogers Co. Okl.,* 459 F.2d 185 (C.A. 10 1972).

3. The oil and gas lease provides that the defendant had the right at any time during or after the expiration of the lease to remove all of its property including the right to draw and remove all casing, and it did this in the process of plugging the wells and abandoning the lease.

4. Mobil Oil Company had a right to be on the premises and it was not a trespasser. It would be gross negligence for the defendant to leave an abandoned oil and gas well open and not properly plugged from the bottom to the surface. *Cleary Petroleum Inc.* v. *Copenhaver,* 476 P.2d 327 (Okla. 1970); *Magnolia Petroleum Co.* v. *Witcher,* 284 P. 297 (Okla. 1929).

5. Plaintiff failed to introduce any evidence to sustain the proposition that the defendant knowingly, willfully, or wrongfully interfered with the plaintiff's contractual relations with Nelson Geyer or Thermo-Dyne, Inc. Further, the acts of defendant were in response to a legal duty and responsibility by virtue of which the defendant could not have been guilty of wrongful interference. *Bailey* v. *Banister,* 200 F.2d 683 (C.A. 10 1952).

6. Mr. Gannon testified that on November 17, 1971, he called an employee of Mobil, a Mr. Bland who was

employed as a senior landman, and asked that Mobil refrain from plugging. Gannon testified that Bland said he would stop the plugging.

The plaintiff's proof did not show Bland to have had authority in such matters and for this reason Gannon's testimony on this issue is without force or effect. *Atchison, Topeka and Santa Fe Railway Co.* v. *Bouziden,* 307 F.2d 230 (C.A. 10 1962).

Even assuming the accuracy of Gannon's uncorroborated testimony, it is fundamental that where one person has purported to act as agent for another, that fact of itself is not sufficient evidence upon which to submit the question of agency to the jury. *Horton* v. *Fielder,* 267 P. 847 (Okla. 1928). In the absence of corroborative evidence, the statements of the purported agent are not even admissible for purposes of establishing agency, and should be excluded from the consideration of the jury. *Horton* v. *Fielder, supra.* Further, a promise made without consideration is unenforceable, 15 O.S. (1971) §2, 106; *Powers Restaurants, Inc.* v. *Garrison,* 465 P.2d 761 (Okla. 1970). There is no evidence that Gannon, to any degree, relied upon Bland's alleged statement and, therefore, Bland's alleged promise was in no way enforceable, *Black Gold Petroleum Co.* v. *Hill,* 108 P.2d 784 (Okla. 1941). As a matter of law there was no consideration given for Bland's alleged promise and consequently there was no issue of fact to be submitted to the jury, 15 O.S. (1971) §2, 106.

7. As the lease was valid throughout the period in dispute and as the lease itself contained no express terms pertaining to plugging and abandoning, save that lessee had the right to remove its property and fixtures and remove casing during or after the expiration of the lease, the subsequent issue is whether Mobil

breached any duty that could be implicitly imposed by the lease. This determination rests upon a consideration of the judicial and equitable doctrine of implied covenants, as it relates to the law of oil and gas leases.

8. The standard by which the oil and gas lessee's duty under implied covenants is measured is the conduct which would be followed by a reasonably prudent operator acting with regard to both his own interests and those of the lessor, *Sun Oil Company* v. *Frantz,* 291 F.2d 52 (C.A. 10 1961); MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES §122 (2d ed. 1940). It also bears observing that it is a well settled rule of law in Oklahoma that oil and gas leases, as with other instruments, incorporate the law into the lease, *see Oklahoma Natural Gas Company* v. *Long,* 406 P.2d 499 (Okla. 1965). Since each case presents varied circumstances, many factors must be considered in applying the "prudent operator rule." One common factor, however, is that of the probability of profit to the lessee, *Whitaker* v. *Texaco, Inc.,* 283 F.2d 169 (C.A. 10 1960); *Chenoweth* v. *Pan American Petroleum Corporation,* 314 F.2d 63 (C.A. 10 1963); a factor not shown by the evidence herein.

9. In the case of *Amax Petroleum Corp.* v. *Corp. Comm'n.,* 47 OBAJ 1600 (decided July 13, 1976) the Corporation Commission ordered the lease owner and operator to plug the gas wells involved. The lease owner and operator appealed from the Order of the Commission, which Order was affirmed by the Supreme Court of Oklahoma in its Opinion cited above. The land owners leased their lands involved herein in 1937, after which numerous gas wells were drilled. By various assignments these wells were finally owned and operated by Amax Petroleum Corporation. In late 1957 or 1958 Amax decided to abandon the gas field, and there

had been no operation of the wells since that time. In 1959 Amax assigned back to the land owners the oil and gas lease. In 1974 the Corporation Commission field inspector found some wells which had not been properly plugged since their abandonment in 1959, approximately 15 years earlier. The testimony shows that some of the wells in the field had been plugged and that others had been assigned back to the lessors. In this connection the Court found:

> "We hold that under the fact situation here that the assignment to the . . . [landowners] did not relieve the appellant [Amax] of its duty to plug the wells.
>
> Our conclusion is supported by our holding in a somewhat similar case, Loriaux v. Corporation Commission, Okl., 514 P.2d 941 (1973)."

The Court further said:

> "Thus, the person to plug the well is the lease operator . . . and the time to plug is when the well is abandoned and certainly not before. . . .
>
> . . .
>
> One final question is suggested by appellant and that involves an order after so much passage of time after abandonment. While this delay is unfortunate, no reason is presented to us as to why this would set aside the lease owner-operator's duties and obligations and we see none. The delay resulted in the failure to plug the wells which the Corporation Commission has held is the appellant's obligation."

10. Plaintiff contended that these wells had value as "prospect holes," for drilling to lower formations, and that such value was destroyed by plugging of the holes. Plaintiff's cited authority for such a proposition, *North Healdton Oil & Gas Co.* v. *Skelley,* 158 P. 1180 (Okla. 1918), does in no wise create such a cause of action. *North Healdton* antedated and thus did not contemplate the plugging rules of the Corporation Commission. Further, *North Healdton* pertains to the breach of drilling contracts for test holes and not lease provisions and the prudent operator rule.

11. Plaintiff's last contention was that Mobil carried out the plugging decision imprudently and maliciously, through placement of steel, chain, and other material into the hole in order to prevent re-entry. Neither the deposition testimony of Geyer nor plaintiff's expert showed the plugging to have been carried out in a fashion outside the range of methods which might properly be used depending on the conditions. Defendant's testimony, unrefuted, showed that the particular geological conditions warranted the use of a "tailpipe" in plugging and in order to prevent leakage. Further, the surface owner testified that the manner in which Mobil plugged the wells in question prevented the migration of oil, gas and other contaminating substances to the surface. Such plugging methods as were used were those necessary to bring about conservation of the surface and subsurface. As is indicated in *Sinclair Oil & Gas Company* v. *Bishop,* 441 P.2d 436 (Okla. 1968), the defendant-operator is entitled, in deciding the degree of plugging necessary, to rely on its own experts.

12. Having reviewed the evidence and the authorities, the Court concludes that, on several bases, the directed verdict should be in defendant's favor. Having carefully considered the evidence in a light most favorable to the plaintiff, *Miller* v. *Brazel,* 300 F.2d 283 (C.A. 10 1962) the Court determined that the evidence supported but one conclusion with which reasonable men could not disagree. Additionally, the particular issues in this case arise out of construction of a written instrument and thus do not present matters

triable of right to a jury.

An appropriate Judgment will accordingly be entered herein.

Dated this 15th day of September, 1976.

Luther Bohanon
UNITED STATES
DISTRICT JUDGE

APPENDIX E

12 Okla. Stat. Anno. 1971 §95:

"Limitation of other actions

Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

. . .

Third. Within two years: an action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property, an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

23 Okla. Stat. Anno. 1971 §5:

"Damages may be awarded in judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future."

23 Okla. Stat. Anno. 1971 §61:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided for by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not."

Oklahoma Corporation Commission Rules and Regulations:

"1-101. DEFINITIONS.

These definitions are provided for the sole purpose or proper interpretations of Corporation Commission rules and regulations:

7. Common Source of Supply or Pool — the term 'common source of supply' shall comprise and include that area which is underlaid, or which from geological or other scientific data, or from drilling operation, or other evidence appears to be underlaid, by a common accumulation of oil and/or gas; provided that, if any such area is underlaid, or appears from geological or other scientific data or from drilling operations or other evidence, to be underlaid by more than one common accumulation of oil or gas separated from each other by strata or earth and not connected with each other, then such area shall as to each said common accumulation of oil or gas be deemed a separate common source of supply (52 O.S.A., §86.1(c).

. . .

15. Development shall mean any work which actively looks toward bringing in production, such as erecting rigs, building tankage, drilling wells, etc.

. . .

35. Operator shall mean the person who is duly authorized and in charge of the development of a lease or the operation of a producing property.

. . .

37. Owner shall mean the person or persons who have the right to drill into and to produce from any common source of supply, and to appropriate the production either for himself, or for himself and others."

"3-401. SCOPE.

(a) The owner and operator of any oil, gas, disposal, injection or other service well, or any seismic, core or other exploratory hole, whether cased or uncased, shall be jointly and severally liable and responsible for the plugging thereof in accordance with these rules.

(b) Each well in which production casing has been run, but which has not been operated for six (6) months; and each well in which no production casing has been run, and for which drilling operations have ceased for thirty (30) consecutive days, shall be immediately plugged. Each well shall be immediately plugged before it is abandoned.

(c) The Director of Conservation may, for good cause, grant reasonable extensions of time within which to plug a well."